SIDNEY O. SMITH

IBLA 82-456 Decided March 24, 1982

Appeal from decision of Montana State Office, Bureau of Land Management, returning documents submitted for recordation of mining claims. MCA-MT-41.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1-2, the owner of a mining claim located on or before Oct. 21, 1976, must file a copy of the official record of the notice or certificate of location for such claim with the proper Bureau of Land Management office on or before Oct. 22, 1979. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute,

Congress did not invest the Secretary with authority to waive or excuse non-compliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Procedure: Adjudication -- Evidence: Generally -- Evidence: Presumptions -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment

Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and that he in fact did so, in enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show, by his compliance with the Act's requirements, that the claim has not been abandoned and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.

4. Administrative Authority: Generally -- Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Recordation

The Department of the Interior, as an agency of the executive branch of Government, is without jurisdiction to determine whether the mining claim recordation provisions of the Federal Land Policy and Management Act of 1976 are constitutional.

5. Notice: Generally -- Regulations: Generally -- Statutes
All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

APPEARANCES: Sidney O. Smith, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Sidney O. Smith appeals the letter decision of January 11, 1982, by which the Montana State Office, Bureau of Land Management (BLM), returned various affidavits of assessment work for and notices of intention to hold the Totten, Buster #1, and Hannah #1 lode mining claims and the Totten Tunnel Site claim, submitted for recordation with a tendered fee of $5, because notices of location for the claims had not been filed with BLM on or before October 22, 1979, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976). The claims, located in July 1940, were considered abandoned and void pursuant to FLPMA.

Appellant charges that the refusal of BLM to record his claims is arbitrary, capricious, erroneous, unlawful and in excess of jurisdiction and authority under FLPMA, the mining laws of 1872, and the Montana mining laws. Appellant argues that notice and a hearing are required under the applicable Federal and state statutes before mining claims can be considered abandoned and that BLM's determination constitutes taking of property without due process, contrary to constitutional guarantees. Appellant alleges expenditure of more than $500 was made on each claim prior to 1976 so that the statutory requirement for application for mineral patent has been satisfied. Appellant states that all the required documents relating to these mining claims have been timely filed in the Office of the County Clerk and Recorder of Jefferson County, Montana. Appellant concedes that he first transmitted documentation of his claims to BLM on December 28, 1981, even though the claims were located in July 1940, and recorded at that time in Jefferson County, Montana. Appellant contends BLM has only the ministerial duty to receive the documents and record the claims. Appellant cites Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), in support of his argument against the determination by BLM that the claims are abandoned and void. He also contends FLPMA was not intended to amend or alter any part or provision of the 1872 mining laws.

[1] Section 314(a) and (b) of FLPMA, 43 U.S.C. § 1744(a) and (b) (1976), require that the owner of an unpatented claim located prior to October 21, 1976, shall, within the 3-year period following the date of approval of the Act, file a copy of the notice of location for the claim in the proper office of BLM and evidence of the performance of assessment work, a notice of intention to hold the claim, or a detailed report provided by the Act of September 2, 1958, 30 U.S.C. § 28-1 (1976), and, prior to December 31 of each year thereafter, file a current proof of assessment work or a notice of intention to hold the claim. Section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), provides that the failure to file the instruments required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim, millsite, or tunnel site by the owner. The regulations in 43 CFR Subpart 3833 implement the requirements of the statute: 43 CFR 3833.4(a) provides that the failure to file an instrument required by section 3833.1 (notice of location) or section 3833.2 (evidence

of assessment work or notice of intention to hold the claim) within the time prescribed therein shall be deemed conclusively to constitute an abandonment of the mining claim, millsite, or tunnel site and it shall be void.

Where, as in this case, copies of notices of location for unpatented mining claims located in 1940 were not tendered to BLM timely for recordation under FLPMA, there was no authority for BLM to accept and record the affidavits of assessment work and notices of intention to hold the claims in December 1981. It was thus proper for BLM to return the documents with the advice contained in the letter decision of January 11, 1982. See Nicolaus P. Newby, 60 IBLA 264 (1981); Robert G. Milton, 60 IBLA 104 (1981); Edgar W. Cook, 58 IBLA 358 (1981); Wayne Cook, 58 IBLA 350 (1981); Modoc Gem and Mineral Society, 58 IBLA 142 (1981).

[2] The argument that the refusal of BLM to accept his documents for recordation is arbitrary, capricious and unlawful cannot stand. In Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), the court held that the regulations promulgated under FLPMA which provide that an unpatented mining claim be deemed abandoned and void if the filings required by FLPMA are not made was not in excess of statutory jurisdiction, authority, or limitation, or short of the statutory right under the Act. Similarly, in Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981), the court stated that section 314(c) of FLPMA leaves the Secretary no discretion because it requires that claims be conclusively deemed abandoned when the filing provisions are not met. The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Company, Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Fahey Group Mines, Inc., 58 IBLA 88 (1981); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); Thomas F. Byron, 52 IBLA 49 (1981).

[3] Appellant argues that his intention not to abandon these claims was apparent and that he has fulfilled the requirements for patenting the claims. At common law, evidence of abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he, in fact, did so. Farrell v. Lockhart, 210 U.S. 142 (1908); 1 Am. Jur. 2d, Abandoned Property §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacting FLPMA, the Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. Fahey Group Mines, Inc., supra; Lynn Keith, supra.

The recording requirements of FLPMA have not changed any material provisions of the 1872 mining laws. The manner of locating a claim, the requirement to perform annual assessment work, and the procedures for applying for mineral patent are exactly as they were before the enactment of FLPMA. BLM reports that no patent application has been filed for the claims. The recording requirements of FLPMA are supplemental and provide the mechanism whereby the Government may have knowledge of the areas embraced in unpatented mining claims and the names of the claimants, as well as a continuing report of the claims which are still maintained by claimants. Whatever rights a mining claimant had before the enactment of FLPMA, he retains, if he has done the mandatory recording called for by section 314 of FLPMA. That section requires recording in two places, the office having local jurisdiction, i.e., the county recorder, and the proper office of BLM. The dual recordations are separate and distinct requirements. Compliance with the one does not constitute compliance with the other. Accomplishment of a proper recording of notice of location or evidence of annual assessment work in the county of record does not relieve the claimant from recording a copy of the recorded instrument in the proper office of BLM under FLPMA and the implementing regulations. Major G. Atkins, 60 IBLA 284 (1981); Enterprise Mines, Inc., 58 IBLA 372 (1981); Johannes Soyland, 52 IBLA 233 (1981). The filing requirements of FLPMA are mandatory, not discretionary. The responsibility for complying with the recordation requirements of FLPMA rests with the claimant.

[4] Appellant's challenge of the constitutionality of the statute and regulations cannot be sustained. To the extent that due process of law requires that claimant be afforded some form of hearing prior to declaring the unpatented mining claims abandoned and void for failure to file timely the instruments required by section 314 of FLPMA, that requirement is satisfied by claimant's right of appeal to this Board. Edgar W. Cook, supra; John J. Schnabel, 50 IBLA 201 (1980). No evidentiary hearing is required where the validity of a claim depends upon the legal effect to be given uncontested facts of record. Edgar W. Cook, supra; John J. Schnabel, supra; Dorothy Smith, 44 IBLA 25 (1979). See United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971); Dredge Corp. v. Penny, 362 F.2d 889 (9th Cir. 1966). The applicable regulations merely mirror the statute and, to the extent that they have been considered by the courts, they have been upheld. See Topaz Beryllium Co. v. United States, supra; Western Mining Council v. Watt, supra.

With respect to the constitutionality of the statute, the Board adheres to its earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is constitutional. Edgar W. Cook, supra; Fahey Group Mines, Inc., supra; Lynn Keith, supra; Alex Pinkham, 52 IBLA 149 (1981).

Appellant's reliance on the district court decision in Topaz Beryllium, supra, is misplaced. The Tenth Circuit, in reviewing Topaz Beryllium on appeal, held that the conclusive presumption of abandonment could not apply in the case where a claimant failed to comply with recordation requirements

imposed only by regulation, absent a notice of the deficiency and an opportunity to comply. But here, where the claimant did not comply with the express statutory requirement, the statutory consequences attach and the Department is powerless to excuse the failure to comply or to afford any relief from the statutory consequences. Fahey Group Mines, Inc., supra; Lynn Keith, supra.

[5] Those who deal with the Government are presumed to have knowledge of the law and the regulations duly promulgated pursuant thereto. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Donald H. Little, 37 IBLA 1 (1978); 44 U.S.C. §§ 1507, 1510 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge